

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY
AT THE TIME OF FILMING. IF AND WHEN A
BETTER COPY CAN BE OBTAINED, A NEW FICHE
WILL BE ISSUED.

SEP 26 PAGE 32

DISTRIBUTED
SEP 23 1988

No. 87-7116

Supreme Court, U.S.
FILED
SEP 20 1988
JOSEPH F. SPANGLER, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

ALVIE JAMES HALE, JR., Petitioner,

v.

THE STATE OF OKLAHOMA, Respondent.

PETITIONER'S REPLY MEMORANDUM

MARK BARRETT
Assistant Appellate Public
Defender
1660 Cross Center Drive
Norman, Oklahoma 73019
405-325-3128

COUNSEL FOR PETITIONER

10 pp

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ALVIE J. HALE, Petitioner,

v.

THE STATE OF OKLAHOMA, Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF OKLAHOMA

PETITIONER'S REPLY MEMORANDUM

The State of Oklahoma, toward the bottom of page fourteen of its "Response to Petition for Writ of Certiorari," states that the Oklahoma Court of Criminal Appeals determined the conflict of interest issue "was not properly preserved for review on appeal because it was not raised in the Petitioner's Petition in Error."

Although the Court of Criminal Appeals did in fact rely on an alleged waiver of the conflict of interest issue, the Oklahoma court's reliance on waiver was inappropriate for each of the reasons listed below.

1. This issue was raised in Petitioner's Amended Petition in Error.

The then-attorney for Petitioner filed an Amended Petition in Error on December 31, 1984 in which the following assignment of error (assignment of error number 67) was listed:

The court abused its discretion in overruling the court-appointed attorney's Application to Withdraw as Counsel of Record due to personal animosity between himself and the appellant.

A copy of that Amended Petition in Error is attached to this Reply as Appendix A. In a related assignment of error in the same amended petition it was alleged that Petitioner was deprived of effective assistance of counsel "in violation of the rights guaranteed by the United States and Oklahoma Constitutions." See Appendix A.

Rule 3.1(D) of the Rules of the Oklahoma Court of Criminal Appeals provides that an amendment to the petition in error is permissible with leave of the court. 22 Okla.Stat., Ch. 18, Appendix. A copy of Rule 3.1(D) is attached hereto as Appendix B. The fact that leave of the Court was granted is demonstrated by the file stamp on the Amended Petition in Error. In fact, the Oklahoma Court of Criminal Appeals routinely authorizes the filing of an amended petition in error so long as it is filed no later than the date of the filing of Appellant's Brief in Chief.

In accordance with this practice, it is the standing policy of the Oklahoma Appellate Public Defender's Office, for which attorney Meek was employed at the time she filed the amended petition, to file routinely an amended petition on the same date the brief is filed. The amended petition in this case was filed at the same time Appellant's brief in chief was filed.

Thus, the waiver determination by the Oklahoma court was not in accord with any previously established state practice, let alone being "the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights." *James v. Kentucky*, 466 U.S. 341, 348-49 (1984).

(2) Requiring that all issues be listed in a petition in error serves no legitimate state purpose, especially where -- as in Mr. Hale's case -- all these issues are listed in an index to the brief. Thus, even if the issues here had not been listed in the petition in error, that should not result in any reason to reject those issues. To insist on such a listing would be to insist on an "arid ritual of meaningless form ..." *Id.* at 349 quoting *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958).

(3) Since the Court of Criminal Appeals sometimes has determined that constitutional issues are fundamental issues entitled to automatic review, the constitutional conflict-of-interest issue is properly before this Court. In *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985), this Court stated:

Under Oklahoma law, and as the State conceded at oral argument, federal constitutional errors are "fundamental." Tr. of Oral Arg. 51-52; see *Buchanan v. State*, 523 P.2d 1134, 1137 (Okla.Crim.App. 1974) (violation of constitutional right constitutes fundamental error); see also *Williams v. State*, 658 P.2d 499 (Okla.Crim.App. 1983). Thus, the State has made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed.

Since, as noted in *Ake*, the Court of Criminal Appeals sometimes considers constitutional error to be fundamental error which can be raised for the first time on appeal, there can be no regularly followed practice to justify, under *James v. Kentucky*, a finding that constitutional error had been waived in Mr. Hale's particular case. See 466 U.S. at 348-49.

(4) Having an attorney who is not actively representing the accused's interests, or having an attorney whose interests conflict with those of the accused, is akin to not having an attorney at all. The right to counsel cannot be waived by inaction. *Carnley v. Cochran*, 369 U.S. 506, 516 (1962).

Although a failure to object to a conflict of interest can require a showing that the lawyer's performance was affected by the conflict, *Cuyler v. Sullivan*, 446 U.S. 335, 348-49 (1980), the Sixth Amendment does not countenance a determination that the right to conflict-free counsel is lost altogether through inaction. (Here, of course, the conflict issue was raised both at trial and on appeal.)

CONCLUSION

Although the State of Oklahoma mentions the Petition in Error waiver principle, it does not even make a direct contention that that principle prevents consideration of any issue which was presented in the Petition for Writ of Certiorari. The constitutional issues involved in the conflict-of-interest claim, as well

as all other constitutional issues in this case, are appropriately before the Court.

Because these issues properly are before the Court and because -- for the reasons set forth in the Petition for Writ of Certiorari -- these issues constitute important federal issues in a case where Petitioner is under sentence of death, the writ should be granted.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Mark Barrett', is written over a horizontal line.

Mark Barrett
Assistant Appellate
Public Defender
1660 Cross Center Drive
Norman, Oklahoma 73019
(405) 325-3128

Counsel for Petitioner

APPENDIX A

Amended Petition in Error

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ALVIE JAMES HALE, Jr.,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Case No. F-84-208

AMENDED PETITION IN ERROR

The Appellant, Alvie James Hale, Jr., appears by his attorney and amends the original Petition in Error filed in his case to include the following:

65. The trial court erred when it failed to allow each Venireman to be questioned individually and privately concerning his exposure to pre-trial publicity and his preconceived opinions about the case;
66. The Appellant was not provided effective assistance of counsel in the first and second stages of trial, in violation of the rights guaranteed by the United States and Oklahoma Constitutions;
67. The court abused its discretion in overruling the court-appointed attorney's Application to Withdraw as Counsel of Record due to personal animosity between himself and the appellant;
68. Imposition of three separate convictions for one criminal act violated the double jeopardy clause of the Oklahoma Constitution;
69. The trial court committed error in failing to grant a mistrial due to the impermissible introduction of State's Exhibit No. 13, which contained the statements that the Appellant had admitted his involvement in the Kidnapping for Extortion charge. These statements violated the Appellant's right to confront witnesses against him;
70. The trial court erred in failing to suppress the in-court identification of the Appellant by Janet Miller, which was unreliable and prejudicial;
71. The trial court erred in admitting into evidence tape recordings of the ransom calls made to the Perry family, when such tape recordings were not properly identified as containing the voice of the Appellant;

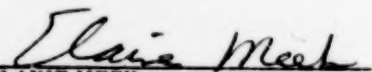
72. The State failed to prove each element of the crime of Kidnapping for Extortion beyond a reasonable doubt; therefore the conviction for Kidnapping is void;
73. Imposing consecutive punishments for First-Degree Murder, Kidnapping for Extortion, and affecting Interstate Commerce by Extortion violated the Oklahoma Constitution's Prohibition against Double Punishment;
74. The State failed to provide sufficient notice of the aggravating circumstances to be proved at trial, and also failed to provide notice of what evidence would be used to prove such aggravating circumstances;
75. The Prosecutor made improper and prejudicial comments in the second stage of trial that no mitigating evidence had been presented. these comments violated the Appellant's rights under the Oklahoma and United States Constitutions;
76. The trial court erred when it failed to properly determine if each juror could set aside his preconceived opinion about the guilt or innocence of the accused. This abuse of discretion deprived the Appellant of his right to a fair and impartial jury;
77. The trial court erred in failing to disqualify jurors McLaughlin and Chesser when they indicated that they had a preconceived opinion about the case. Mrs. Chesser also indicated that she had discussed the case with a crucial witness for the State, and she should have been disqualified on this basis;

For the reasons stated above, and for the reasons stated in his original Petition in Error, the Appellant respectfully requests that the Judgment and Sentence of the District Court be reversed.

Respectfully submitted,

ALVIE JAMES HALE, Jr.

By:


ELAINE MEEK
Bar Association Number 10399
Assistant Appellate Public Defender
300 Timberdell Road
Norman, Oklahoma 73019
(405) 364-6153

ATTORNEY FOR APPELLANT

APPENDIX B

Rule 3.1 of the Court of Criminal Appeals

that it was not filed in compliance with court rule pertaining to the filing of a counterdesignation within ten days of time defendant filed designation of record. *Vantine v. City of Tulsa, Okl. Cr. 518 P.2d 316 (1973).*

SECTION III. PERFECTING AN APPEAL IN THE COURT OF CRIMINAL APPEALS

Library References

Criminal Law ¶1068½.
C.J.S. Criminal Law § 1701.

Rule 3.1. Contents of petition in error—Filing

A. Petition in error. The appellant's petition in error must contain the following:

- (1) The trial court from which the appeal is being lodged and the district court case number,
- (2) The crime for which the appellant was convicted,
- (3) The judgment and sentence imposed and the date of pronouncement,
- (4) The date the motion for new trial was filed and the date it was overruled,
- (5) The amount of bail and whether or not the appellant is free on bail or incarcerated,
- (6) The errors of law urged as having been committed during the progress of the trial,
- (7) The nature of the relief the appellant seeks.

B. Style of petition in error. The party filing the petition in error shall be known as the "appellant." The party against whom the appeal is taken shall be known as the "appellee."

C. Filing of petition in error. The petition in error shall be filed with the Clerk of this Court at the same time the appeal records are filed, and the Clerk of this Court shall affix the original of the petition in error to the records for appeal when they are filed.

D. Amendment of petition in error. Before an amendment to the petition in error may be filed, the appellant must obtain leave of this Court.

Historical Note

Designation of parties. The order of the Supreme Court of April 3, 1972, which amended former Rule 2.4, relating to the same subject matter provides:

All cases circulated or promulgated on and after April 5, 1972, shall be styled in accordance with provisions of 20 O.S. 1971 § 3802: